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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 633.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, a Corporation,
Petitioner,

v.

WILLIAM A. STAENGEL,
Respondent.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX.

Page

Statement 1

Undisputed facts 2

Misstatements of fact in petitioner's petition..... 3

Opinions of the courts below..... 7

Summary of the argument..... 8

Argument 9

I. The decision and holding of the courts below in the case at bar, to the effect that reliance upon the doctrine of res ipsa loquitur may be had in an action under the Federal Employers' Liability Act, is not in conflict with any decision of this Court, and is supported by an unbroken line of decisions in the lower federal courts.... 9

II. The decision and holding of the courts below in the case at bar, to the effect that, after plaintiff made a prima facie case under the doctrine of res ipsa loquitur, the case could not be taken from the jury and a verdict directed for defendant, unless all the circumstances were such as to preclude a finding of defendant's negligence, is in complete harmony with the decisions of this Court, and with an unbroken line of decisions of the lower federal courts. In so ruling, the courts below did not refuse to apply any established doctrine relating to the instruction of verdicts 13

III. The decision and holding of the courts below in the case at bar were in complete harmony with the established law in holding that, if there was any error resulting from a violation of Rule 51 of the Federal Rules of Civil Procedure when the trial court included in its general charge a part of a special request which had been refused as a whole because erroneous as a whole, such error was not prejudicial to petitioner railway so as to require reversal, because petitioner's counsel treated the matter as static and requested no relief from, or correction of, such error 21

Conclusion 29

Cases Cited.

Atlas Powder Co. v. Benson, 3 Cir., 287 F. 797..... 16

Baltimore & O. R. Co. v. Kast, 6 Cir., 299 F. 419, certiorari denied 266 U. S. 613, 45 S. Ct. 95, 69 L. ed. 468 .....12, 13

Bausch Machine Tool Co. v. Aluminum Co., 2 Cir., 72 F. 2d 236, 240-241..... 20

Best v. District of Columbia, 291 U. S. 411, 415, 54 S. Ct. 487, 78 L. ed. 882..... 16

Bowden v. Johnson, 107 U. S. 251, 263, 2 S. Ct. 246, 27 L. ed. 386..... 20

Carpenter v. Baltimore & O. R. Co., 6 Cir., 109 F. 2d 375 13

Central R. Co. of N. J. v. Peluso, 2 Cir., 286 F. 661, certiorari denied 261 U. S. 613, 43 S. Ct. 359, 67 L. ed. 827 12

Chesapeake & O. R. Co. v. De Atley, 241 U. S. 310, 313, 36 S. Ct. 564, 60 L. ed. 1016..... 12

Chesapeake & O. R. Co. v. Smith, 6 Cir., 42 F. 2d 111, certiorari denied 282 U. S. 856, 51 S. Ct. 32, 75 L. ed. 758 13
Chicago, M. & St. P. R. Co. v. Irving, 9 Cir., 234 F. 562 16
Clark v. Riemsdyk, 9 Cranch. [13 U. S.] 153, 160, 3 L. Ed. 688..... 20
Cochran v. Pittsburgh & L. E. R. Co. (D. C. Ohio), 31 F. 2d 769.....13, 17

Dierks Lumber & Coal Co. v. Brown, 8 Cir., 19 F. 2d 732 .....17, 18
Doughnut Machine Corp. v. Bibbey, 1 Cir., 65 F. 2d 634 17

Eker v. Pettibone, 7 Cir., 110 F. 2d 451..... 13
Erie R. Co. v. Murphy, 2 Cir., 9 F. 2d 525..... 13

Fisher v. Washington Coca Cola Bottling Works (App. D. C.), 84 F. 2d 261..... 17

Gibson v. Southern Pac. Co., 5 Cir., 67 F. 2d 758, certiorari denied 291 U. S. 673, 54 S. Ct. 458, 78 L. ed. 1062 17
Gleeson v. Virginia Midland R. Co., 140 U. S. 435, 444, 11 S. Ct. 859, 35 L. ed. 458..... 15
Gray v. Baltimore & O. R. Co., 7 Cir., 24 F. 2d 671....17, 18
Gunning v. Cooley, 281 U. S. 90, 94, 50 S. Ct. 231, 74 L. ed. 720..... 16

Hagan & Cushing Co. v. Washington Water Power Co., 9 Cir., 99 F. 2d 614..... 17

Iarussi v. Missouri Pacific R. Co. (C. C. Ill.), 155 F. 654, affirmed 7 Cir., 161 F. 66..... 11
Illinois Central R. Co. v. Skaggs, 240 U. S. 66, 70, 36 S. Ct. 249, 60 L. ed. 528..... 12

Jacobs v. United States, 6 Cir., 31 F. 2d 568..... 20

Kanawha & Michigan R. Co. v. Kerse, 239 U. S. 576, 580, 36 S. Ct. 174, 60 L. ed. 448..... 12

Kaemmerling v. Athletic Mining & Smelting Co., 8 Cir., 2 F. 2d 574, 581 11
Kempner v. Churchill, 8 Wall. (75 U. S.) 362, 369, 19 L. ed. 461 20
La Nereyda, 8 Wheat. (21 U. S.) 108, 170, 5 L. ed. 574 20
Lehigh Valley R. Co. v. Ciechowsky, 2 Cir., 10 F. 2d 82, certiorari denied 270 U. S. 654, 46 S. Ct. 352, 70 L. ed. 786 ..... 16, 17
Lilienthal's Tobacco v. United States, 97 U. S. 237, 267-268, 24 L. ed. 901 15
Looney v. Metropolitan R. Co., 200 U. S. 480, 26 S. Ct. 303, 50 L. Ed. 564 10
Lowery v. Hocking Valley R. Co., 6 Cir., 60 F. 2d 78 ... 13
Lumbra v. United States, 290 U. S. 551, 553, 54 S. Ct. 272, 78 L. ed. 492 16

May Dept. Stores Co. v. Bell, 8 Cir., 61 F. 2d 830 .... 17, 18

Noce v. St. Louis-S. F. R. Co., 337 Mo. 689, 85 S. W. 2d 637 13
New Orleans & N. E. R. Co. v. Harris, 247 U. S. 367, 38 S. Ct. 535, 62 L. Ed. 1167 10
New York Central R. Co. v. Johnson, 8 Cir., 27 F. 2d 699, reversed on other grounds 279 U. S. 310, 49 S. Ct. 300, 76 L. ed. 706 16
Northern Pacific R. Co. v. Dixon, 8 Cir., 139 F. 737, 740 11

Patton v. Texas & P. R. Co., 179 U. S. 658, 21 S. Ct. 275, 45 L. Ed. 361 10

St. Louis & S. F. R. Co. v. Brown, 241 U. S. 223, 228, 36 S. Ct. 602, 60 L. ed. 966 12
San Juan Light & Transit Co. v. Requena, 224 U. S. 89, 98-99, 32 S. Ct. 399, 56 L. Ed. 680 9
Southern R. Co. v. Bennett, 233 U. S. 80, 85, 34 S. Ct. 566, 58 L. ed. 860 13
Southern R. Co. v. Derr, 6 Cir., 240 F. 73 12

Southern R. Co. v. Hussey, 8 Cir., 42 F. 2d 70, affirmed 283 U. S. 136, 51 S. Ct. 369, 75 L. ed. 908.....17, 18
Sweeney v. Erving, 228 U. S. 233, 240, 33 S. Ct. 416, 57 L. ed. 815.....14, 18

Terminal R. Ass'n of St. Louis v. Staengel, 8 Cir., 122 F. 2d 271..... 7
The Robert Edwards, 6 Wheat. [19 U. S.] 187, 190, 5 L. Ed. 238..... 20
The Wenona, 19 Wall. (86 U. S.) 41, 58, 22 L. Ed. 52.. 20

United States v. Mann, 7 Cir., 108 F. 2d 354, 356..... 20

Western Atlantic R. Co. v. Hughes, 278 U. S. 496, 498, 49 S. Ct. 231, 73 L. ed. 473..... 16
Williams v. St. Louis-S. F. R. Co., 337 Mo. 667, 85 S. W. 2d 624 13

Statutes Cited.

Federal Employers' Liability Act (Act of Apr. 22, 1908, c. 149, 35 Stat. 65, as amended by the Act of April 5, 1910, c. 149, 35 Stat. 66, and the Act of August 11, 1939, c. 685, 53 Stat. 1404; 45 U. S. C. A. §§ 51-60, as amended) 2, 8, 9, 12, 13
Federal Rules of Civil Procedure, Rule 51.....8, 22, 23
Federal Rules of Civil Procedure, Rule 61.....26, 28

Judicial Code, Sec. 269, as amended, 28 U. S. C. A. § 391 26

Textbooks Cited.

Greenleaf on Evidence, 16 Ed., Vol. 1, § 13, p. 24..... 20

Wigmore on Evidence, Vol. 1, 3rd ed.:
§ 25, p. 398..... 19
§ 26, pp. 401-406..... 19
§§ 320-321, pp. 793-802..... 19

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT.

The statement of the facts of this case made by petitioner in its petition for writ of certiorari, and brief in support thereof, misstates the character and effect of petitioners' evidence, and is so highly partisan and misleading that respondent is compelled to make a statement of his own, as the case is one which requires a comprehensive understanding of the factual situation involved.

Undisputed Facts.

This action was brought and maintained by the respondent, William A. Staengel, against petitioner Terminal Railroad Association of St. Louis, under the Federal Employers' Liability Act (Act of Apr. 22, 1908, c. 149, 35 Stat. 65, as amended by the Act of Apr. 5, 1910, c. 149, 35 Stat. 66, and the Act of August 11, 1939, c. 685, 53 Stat. 1404; 45 U. S. C. A. §§51-60, as amended), to recover damages for injuries sustained by the respondent, who was a switchman in the employ of petitioner, shortly after 9 o'clock on the night of October 20, 1939.

The respondent pleaded his case on the theory of general negligence of the defendant under the doctrine of res ipsa loquitur (R. 2-4).

At the time of his injury, respondent was acting as rear brakeman, or flagman, on one of defendant's trains, consisting of some 27 cars (R. 11), being hauled westwardly by an engine, from East St. Louis, Illinois, to petitioner's Ewing avenue yards in St. Louis, Missouri (R. 10-13). He was riding in the required and customary place for the rear brakeman to ride during such a movement, seated on the rear end sill of the rear car of the train (R. 12), which car was an unusually long gondola car, heavily loaded with sand (R. 11-12).

In the course of its movement through petitioner's St. Louis yards before reaching the Ewing avenue yard, this train was routed over petitioner's westbound main line track, known as track No. 72 (R. 13), passing over various switches, one of which was known as No. 13, and which connected a track leading to the Eleventh street yard with petitioner's main track No. 72 (R. 13-14). As the train passed over this No. 13 switch, moving at a speed of 20 to 25 miles an hour (R. 13), all of the train excepting the rear

truck of the rear car went down the main line track No. 72, as intended, but the rear truck of that car of sand went down the Eleventh street track instead of following the balance of the train down the main line track (R. 14). With its front truck moving on the main line track No. 72, and its rear truck moving on the Eleventh street track, this car of sand was caused to move increasingly sideways by the divergence of the two tracks for a short distance until it derailed and turned over, striking a steel pier between the two tracks which supported an overhead structure (R. 13-14), and causing the respondent, who had started to get up from his seated position when he observed the abnormal movement of the rear end of the car, to be thrown from the car and severely injured (R. 15).

The immediate cause of the unusual movement of this rear car of the train was an abnormal operation of the switch No. 13 as the car was passing over it (R. 22-24, 113-14, 154; Petitioner's Petition, p. 3).

The foregoing facts are not only undisputed in the evidence, but, in substance, are conceded in the pleadings (R. 2-4, 5-6), and constitute the substance of the respondent's evidence as to the occurrence out of which this action arose.

Misstatements of Fact in Petitioner's Petition.

The petitioner, while it consistently and frankly has conceded that its evidence wholly failed to show the cause of the abnormal operation of this switch so as to produce the derailment (Petitioner's petition, p. 3; R. 81, 85, 111, 154, 155), here boldly asserts that its evidence was "undisputed," "uncontradicted," "unimpeached" and "not contrary to any physical law," and blandly assumes that its evidence, if true, was sufficient to compel the conclusion that petitioner was not negligent. Both petitioner's asser-

tion and its assumption are completely refuted by its own evidence.

Petitioner's bold assertion is refuted by its evidence to the effect that this switch was controlled and operated only from "X-office" tower, which was some 300 feet east of the switch (R. 55-56, 67), by means of levers located there, which controlled electric circuits operating compressed air devices and mechanisms located adjacent to the switch and which threw the switch points back and forth (R. 56-57), and that an electric circuit in the track, extending for some 300 feet from the switch (R. 89), was so arranged as to lock the switch, and make it impossible for the switch to be thrown, so long as any part of a train was passing over the switch or upon the circuit in the track (R. 57-58, 59, 69, 75, 88, 154-155, 156)—which evidence is directly opposed to the conceded fact that this switch did operate and change while the car of sand upon which plaintiff was riding was passing over it, and was directly opposed to petitioner's evidence that, immediately after the derailment of that car of sand, and while the train was still standing in the immediate vicinity of the switch, the switch was found to be again in its normal position "lined for 72 main-line track" (R. 73), indicating that it had again moved after the diversion of the rear truck of the sand car onto the Eleventh street track. Petitioner's bold assertion is refuted further by the contradiction between the testimony of its signal repair man, Williams, to the effect that, if anything went wrong with any of the electric circuits, the switch would be locked automatically and could not be thrown (R. 76), and the testimony of its witness and signal engineer, Hix, to the effect that, if anything went wrong so as to insulate the electric circuits, the switch would not be locked and could be thrown the same as if there were no train in the vicinity of it (R. 87, 88, 90)—Williams' testimony in this connection also being in con-

flict with the testimony of other of petitioner's employee-witnesses, which disclosed that abnormal operation of these switches, such as occurred to produce the derailment here involved, was not unknown, but sometimes occurred as frequently as four or five times in an hour, and sometimes as infrequently as once a month (R. 61), and was frequently caused by sand on the tracks which came from the "engines" or locomotives (R. 61, 87, 100).

Petitioner's assumption that its evidence, if true, compelled the conclusion that petitioner was entirely free from negligence is completely destroyed by petitioner's own evidence. Although petitioner's evidence tended to show that, immediately after the derailment here involved and again on the following morning, inspections and tests were made of the devices which controlled and operated the switch, the petitioner's evidence established that such inspections and tests were confined to the electrical circuits (R. 75, 76-77, 78, 79, 80), and were limited to the exposed wiring of those circuits so as to not include such of the wiring as was located underground (R. 77)—there being no evidence whatsoever as to any inspections or tests being made of the compressed air devices and mechanisms which constituted an essential and integral part of the complicated mechanism by which the switch was operated. Although petitioner's evidence tended to show that some inspections and tests were made of this switch after the derailment here involved had occurred, there was no evidence that petitioner had any regular, methodical, orderly and effective system of inspection and testing of the complicated switch mechanisms or devices, or any other regular and systematic maintenance of them, in an effort to prevent abnormal operation of the switches such as occurred to produce this derailment, nothwithstanding that petitioner's evidence established that such abnormal operation was not infrequent (R. 61, 87, 100), but, on the contrary, peti-

tioner's evidence tended to show that its practice was to wait until a failure occurred before making any inspection, tests, or repairs (R. 60, 75, 76). Although petitioner offered the testimony of its witnesses Mason, Oswald and Williams to the effect that this switch operated "perfectly" before and after the occurrence of the derailment here involved (R. 58, 72, 74), their testimony was, necessarily, limited to the time of day during which they worked, viz.: on the eight-hour shift from 3 p. m. to 11 p. m. (R. 67, 75, 103-104), and petitioner's evidence wholly failed to show the character of the operation of this switch during the other sixteen hours of the day on which plaintiff was injured, as well as on the days preceding and following. Although petitioner's evidence tended to show that, except for "routine repairs," no repairs were made to this switch after the occurrence of respondent's injuries (R. 74), it wholly failed to show of what those "routine repairs" consisted, or the extent, nature and purpose of such repairs as its witnesses considered "routine." Although the petitioner's evidence tended to show that an "investigation" was made by it in an effort to determine the cause of the abnormal operation of this switch on the occasion here involved, the inadequacy of that investigation to disclose the cause is shown by petitioner's evidence to the effect that such "investigation" consisted of no more than a visual examination of the open and exposed parts of the devices and appliances which operated the switch, and an interview with the men who operated those devices (R. 84, 86).

We could point out numerous other examples of conflicts in petitioner's evidence, which completely refute any contention that such evidence was uncontradicted, undisputed and unimpeached, and we could point out numerous other portions of petitioner's evidence to demonstrate that petitioner's evidence was not adequate or suffi-

cient to compel the conclusion that there was a total absence of negligence on the part of petitioner. We will, however, not undertake to cite such examples, because the Circuit Court of Appeals below distinctly found that petitioner's evidence, if true, was not adequate and sufficient to compel the conclusion that petitioner was not negligent (R. 154-155), and further found that petitioner's evidence was not so uncontradicted, undisputed and unimpeached as to require its acceptance by the jury or the courts (R. 156-157).

The fact of the matter is that petitioner here sought to exonerate itself from the inference of negligence arising from the facts of the occurrence, not by proof of the cause of the occurrence and proof that petitioner was not negligent with respect to such cause, but by proof of its lack of knowledge as to the cause, and its failure to ascertain such cause.

OPINIONS OF THE COURTS BELOW.

There was no opinion rendered by the trial court.

Since this proceeding has been instituted in this court, the opinion of the Circuit Court of Appeals for the Eighth Circuit, here sought to be reviewed, has been reported as Terminal R. Ass'n of St. Louis v. Staengel, 8 Cir., 122 F. 2d 271. It also appears in the record at pages 151 to 165.

SUMMARY OF THE ARGUMENT.

I.

The decision and holding of the courts below in the case at bar, to the effect that reliance upon the doctrine of res ipsa loquitur may be had in an action under the Federal Employers' Liability Act, is not in conflict with any decision of this Court, and is supported by an unbroken line of decisions in the lower federal courts.

II.

The decision and holding of the courts below in the case at bar, to the effect that, after plaintiff made a prima facie case under the doctrine of res ipsa loquitur, the case could not be taken from the jury and a verdict directed for defendant, unless all the circumstances were such as to preclude a finding of defendant's negligence, is in complete harmony with the decisions of this Court, and with an unbroken line of decisions of the lower federal courts. In so ruling, the courts below did not refuse to apply any established doctrine relating to the instruction of verdicts.

III.

The decision and holding of the courts below in the case at bar were in complete harmony with the established law in holding that, if there was any error resulting from a violation of Rule 51 of the Federal Rules of Civil Procedure when the trial court included in its general charge a part of a special request which had been refused as a whole because erroneous as a whole, such error was not prejudicial to petitioner railway so as to require reversal, because petitioner's counsel treated the matter as static and requested no relief from, or correction of, such error.

ARGUMENT.

I.

The Circuit Court of Appeals for the Eighth Circuit, in the case at bar, clearly ruled that the doctrine of res ipsa loquitur may be applied in an action under the Federal Employers' Liability Act.

The conditions under which the doctrine of res ipsa loquitur is applicable were concisely stated by this Court in San Juan Light & Transit Co. v. Requena, 224 U. S. 89, 98-99, 32 S. Ct. 399, 56 L. Ed. 680, wherein it was said:

> "* * * when a thing which causes injury, without fault of the injured person, is shown to be under the exclusive control of the defendant, and the injury is such as in the ordinary course of things does not occur if the one having such control uses proper care, it affords reasonable evidence, in the absence of an explanation, that the injury arose from the defendant's want of care."

It is manifest that the facts in the case at bar fit exactly the requirements of the foregoing quotation for the application of the doctrine of res ipsa loquitur, because (1) there is no contention or pretense that the respondent here was guilty of any negligence, (2) the petitioner railway indisputably had full and exclusive control of all the devices and appliances which produced the occurrence resulting in respondent's injury, and (3) the occurrence and the injury were such as in the ordinary course of things do not occur if ordinary care is exercised by the one having such control of the devices and appliances involved.

Petitioner railway, however, contends that this Court should undertake a review of the opinion and decision of the Circuit Court of Appeals for the Eighth Circuit in the

case at bar because, it asserts, this Court has clearly ruled that the doctrine of res ipsa loquitur is not applicable in a servant's action against his master for injuries sustained in the course and scope of his employment, and, further, because there is a sharp division of opinion among the lower federal courts as to whether the doctrine of res ipsa loquitur is applicable in such cases.

We are unable to find any decision of this Court which passes upon the question of whether the doctrine of res ipsa loquitur may be applied in the ordinary action by a servant against his master for injuries sustained in the course and scope of his employment, and, certainly petitioner railway company has cited no such a case, because the decisions of this Court which petitioner does cite—Patton v. Texas & P. R. Co., 179 U. S. 658, 21 S. Ct. 275, 45 L. Ed. 361, which involved an injury to a railroad fireman from a fall from a defective step on an engine; Looney v. Metropolitan R. Co., 200 U. S. 480, 26 S. Ct. 303, 50 L. Ed. 564, which involved an injury to a street railway "pitman" from electric shock while engaged in making the transition of the power supply on an electric street car from an underground system to an overhead system; and New Orleans & N. E. R. Co. v. Harris, 247 U. S. 367, 38 S. Ct. 535, 62 L. Ed. 1167, which involved an injury to a brakeman from being struck and run over by the tender of a moving locomotive—are all cases in which there was a total failure to meet the requirements for the application of the doctrine of res ipsa loquitur, irrespective of the existence of the relationship of master and servant, and in which, accordingly and under the general rule, the fact of the occurrence and the injury carried with it no presumption or inference of negligence on the part of the master.

With the qualification that such contention is appli-

cable only to ordinary common-law cases involving a servant's action against his master for injuries sustained by him in the course and scope of his employment, we readily concede petitioner railway's assertion that "there is a sharp division of opinion among the Circuit Courts of Appeal as to whether or not the res ipsa loquitur theory ever applies to an action between servant and master" (Petitioner's Brief, p. 15). We need not, however, undertake any extended discussion of that division of opinion, because, even if it be accepted as the rule that the doctrine of res ipsa loquitur is not applicable in ordinary common-law cases between servant and master for injuries sustained by the servant, the reason for that rule fails, and the rule itself fails, in actions brought under the Federal Employers' Liability Act.

In those decisions of the various circuit courts of appeal which rule that the doctrine of res ipsa loquitur is not applicable in a servant's action against his master for injuries sustained in the course and scope of his employment, the reasons given for so holding are that, because of the variety of risks assumed by an employee at common law, including the risk of negligence of a fellow servant, and because under the common law an employee is barred completely from recovery for injury produced in part by his contributory negligence, the mere happening of an occurrence which causes an injury to a servant does not indicate whether it resulted from a risk so assumed, whether it was produced in part by contributory negligence of the emloyee, or whether it was produced by a cause for which the master was liable, and, therefore, raises no presumption or inference of actionable negligence on the part of the employer (Northern Pacific R. Co. v. Dixon, 8 Cir., 139 F. 737, 740, cited and quoted in Kaemmerling v. Athletic Mining & Smelting Co., 8 Cir., 2 F. 2d 574, 581; Iarussi v. Missouri Pacific R. Co. [C. C. Ill.], 155 F. 654, affirmed, 7 Cir., 161 F. 66). The

Federal Employers' Liability Act, however, abrogates the common-law doctrines of assumption of risk and contributory negligence as a bar to a recovery by an injured employee; by section 1 of that act (45 U. S. C. A., Sec. 51, as amended) the fellow servant rule is abrogated, and the master specifically is made liable for injury to a servant resulting from the negligence of a fellow servant, by the placing of negligence of a fellow servant upon the same basis as negligence of the master (Kanawha & Michigan R. Co. v. Kerse, 239 U. S. 576, 580, 36 S. Ct. 174, 60 L. ed. 448; Chesapeake & O. R. Co. v. De Atley, 241 U. S. 310, 313, 36 S. Ct. 564, 60 L. ed. 1016); by section 3 of the act (45 U. S. C. A., Sec. 53), the contributory negligence rule is abrogated by specific provision that "the fact that the employee may have been guilty of contributory negligence shall not bar a recovery" (Illinois Central R. Co. v. Skaggs, 240 U. S. 66, 70, 36 S. Ct. 249, 60 L. ed. 528; St. Louis & S. F. R. Co. v. Brown, 241 U. S. 223, 228, 36 S. Ct. 602, 60 L. ed. 966); and by section 4 of the act (45 U. S. C. A., Sec. 54, as amended), assumption of risk by an employee, again and specifically, is abolished as a defense. As a result of the abrogation of these doctrines by the Federal Employers' Liability Act, the reasons for the rule—if it be the rule—that the doctrine of res ipsa loquitur is not applicable to cases between servant and master, fails completely.

Accordingly, and as a result of the same reasoning as is heretofore advanced, an unbroken line of decisions of the lower federal courts supports the proposition that, if the facts are such as to bring the case within that doctrine, the doctrine of res ipsa loquitur may be applied in an action under the Federal Employers' Liability Act (Southern R. Co. v. Derr, 6 Cir., 240 F. 73; Central R. Co. of N. J. v. Peluso, 2 Cir., 286 F. 661, certiorari denied 261 U. S. 613, 43 S. Ct. 359, 67 L. ed. 827; Baltimore & O. R. Co. v. Kast, 6 Cir., 299 F. 419, certiorari denied 266 U. S.

613, 45 S. Ct. 95, 69 L. ed. 468; Erie R. Co. v. Murphy, 2 Cir., 9 F. 2d 525; Cochran v. Pittsburgh & L. E. R. Co. [D. C. Ohio], 31 F. 2d 769; Chesapeake & O. R. Co. v. Smith, 6 Cir., 42 F. 2d. 111, certiorari denied 282 U. S. 856, 51 S. Ct. 32, 75 L. ed. 758; Lowery v. Hocking Valley R. Co., 6 Cir., 60 F. 2d 78; Carpenter v. Baltimore & O. R. Co., 6 Cir., 109 F. 2d 375; Eker v. Pettibone, 7 Cir., 110 F. 2d 451. (Compare, also, Williams v. St. Louis-S. F. R. Co., 337 Mo. 667, 85 S. W. 2d 624, and Noce v. St. Louis-S. F. R. Co., 337 Mo. 689, 85 S. W. 2d 637.) The foregoing decisions find much support in Southern R. Co. v. Bennett, 233 U. S. 80, 85, 34 S. Ct. 566, 58 L. ed. 860, as the Circuit Court of Appeals below clearly indicated in its opinion (122 F. 2d, l. c. 273-274; R. 152).

It follows that the opinion and decision of the Circuit Court of Appeals for the Eighth Circuit in the case at bar is in complete harmony with a well-settled and unbroken line of decisions of the various circuit courts of appeal, and is not in conflict with any decision of this Court, in holding the doctrine of res ipsa loquitur to have been applicable to respondent's action under the Federal Employers' Liability Act.

II.

The opinion and decision of the Circuit Court of Appeals for the Eighth Circuit below, in the case at bar, ruled substantially that, once a prima facie case is made by a plaintiff under the doctrine of res ipsa loquitur, a verdict may not be directed for defendant upon defendant's evidence, unless the circumstances be such that no jury would be justified in rejecting such evidence and no court justified in sustaining a verdict so doing (R. 152-153)—and the Court then went on to rule that the petitioner railway's evidence in this case was not of such undisputed, uncontradicted and unimpeached character, and so fully demon-

strative of petitioner's freedom from negligence as to require its acceptance by a court or jury (R. 154-157).

The mere statement of the true substance of the ruling of the Circuit Court of Appeals refutes petitioner's assertion that the opinion and decision below violated the established rule of this Court regarding the direction of verdicts, which is to the effect that, where the evidence of a party is uncontradicted, unimpeached and violative of no natural law, or is so overwhelmingly in his favor that a verdict against him would not be permitted to stand, then a verdict should be directed in his favor. The mere statement of the true substance of the ruling of the Circuit Court of Appeals also refutes petitioner's bald assertion that its evidence was uncontradicted, unimpeached and violative of no natural law, or so overwhelmingly in its favor that a verdict against it would not be permitted to stand.

The correctness of the ruling of the Circuit Court of Appeals, to the effect that a verdict may not be directed for defendant in a res ipsa loquitur case excepting under rare and exceptional circumstances, is fully sustained by the decisions of this Court, which have ruled, in substance and effect, that, in a res ipsa loquitur case, the facts of the occurrence furnish substantial circumstantial evidence of the defendant's negligence warranting an inference of such negligence and requiring submission to the jury of the issue of such negligence after all of the evidence in the case had been introduced.

In Sweeney v. Erving, 228 U. S. 233, 240, 33 S. Ct. 416, 57 L. ed. 815, this Honorable Court said:

> "In our opinion, res ipsa loquitur means that **the facts of the occurrence warrant the inference of negligence**, not that they compel such an inference; that **they furnish circumstantial evidence of negligence** where direct evidence of it may be lacking, but it is

evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that **they make a case to be decided by the jury,** not that they forestall the verdict. Res ipsa loquitur, where it applies, does not convert the defendant's general issue into an affirmative defense. **When all the evidence is in, the question for the jury is, whether the preponderance is with the plaintiff.**" (Emphasis ours.)

In the earlier case of Gleeson v. Virginia Midland R. Co., 140 U. S. 435, 444, 11 S. Ct. 859, 35 L. ed. 458, this Honorable Court said in this same connection:

> "The law is that the plaintiff must show negligence in the defendant. This is done *prima facie* [in a res ipsa loquitur case] by showing * * * that the accident occurred. If that accident was in fact the result of causes beyond the defendant's responsibility, or of the act of God, **it is still nonetheless true that the plaintiff has made out his *prima facie* case.** When he proves the occurrence of the accident, the defendant must answer that case from all the circumstances of exculpation, whether disclosed by the one party or the other. They are its matter of defense. **And it is for the jury to say, in the light of all the testimony, and under the instructions of the court, whether the relation of cause and effect did exist, as claimed by the defense, between the accident and the alleged exonerating circumstances * * *.**" (Emphasis and bracketed portion supplied.)

The foregoing pronouncements are nothing more than the application to a res ipsa loquitur case of the fundamental doctrines announced by Mr. Justice Clifford in Lilienthal's Tobacco v. United States, 97 U. S. 237, 267-268, 24 L. ed. 901, wherein it was said:

> "* * * the plaintiff in every case may safely rest when he has introduced proof to make a *prima facie* case."
>
> * * * * * * *

> "Whenever evidence is offered to the jury which is in its nature *prima facie* or presumptive proof, its character as such ought not to be disregarded; and **no court has a right to direct a jury to disregard it, or to view it under any different aspect from that in which it is actually presented.** Crane v. Morris et al., 6 Pet. 598." (Emphasis supplied.)

Those doctrines have been consistently carried forward by this Court in its rulings that the credibility of the witnesses, and the weight and effect of the evidence, are for the determination of the jury and not for the determination of the courts; that a plaintiff is entitled to the benefit of all of the evidence favorable to him, and all favorable inference which reasonably may be drawn from the evidence; and that a verdict may not be directed for a defendant, and the plaintiff's case must be submitted to the jury "where uncertainty arises either from a conflict in the testimony or because, the facts being undisputed, fair-minded men may honestly draw different conclusions from them" (Gunning v. Cooley, 281 U. S. 90, 94, 50 S. Ct. 231, 74 L. ed. 720; Lumbra v. United States, 290 U. S. 551, 553, 54 S. Ct. 272, 78 L. ed. 492; Western Atlantic R. Co. v. Hughes, 278 U. S. 496, 498, 49 S. Ct. 231, 73 L. ed. 473; Best v. District of Columbia, 291 U. S. 411, 415, 54 S. Ct. 487, 78 L. ed. 882).

An unbroken line of decision of the lower federal courts rule, as did the Circuit Court of Appeals for the Eighth Circuit in its decision of the case at bar, that, once a prima facie case is made by a plaintiff under the doctrine of res ipsa loquitur, a verdict may not be directed for defendant merely because defendant's evidence may not be directly contradicted or impeached (Chicago, M. & St. P. R. Co. v. Irving, 9 Cir., 234 F. 562; Atlas Powder Co. v. Benson, 3 Cir., 287 F. 797; Lehigh Valley R. Co. v. Ciechowsky, 2 Cir., 10 F. 2d 82, certiorari denied 270 U. S.

654, 46 S. Ct. 352, 70 L. ed. 786; New York Central R. Co. v. Johnson, 8 Cir., 27 F. 2d 699, reversed on other grounds 279 U. S. 310, 49 S. Ct. 300, 76 L. ed. 706; Cochran v. Pittsburg & L. E. R. Co. [D. C. Ohio], 31 F. 2d 769; Southern R. Co. v. Hussey, 8 Cir., 42 F. 2d 70, affirmed 283 U. S. 136, 51 S. Ct. 369, 75 L. ed. 908; May Dept. Stores Co. v. Bell, 8 Cir., 61 F. 2d 830; Doughnut Machine Corp. v. Bibbey, 1 Cir., 65 F. 2d 634; Gibson v. Southern Pac. Co., 5 Cir., 67 F. 2d 758, certiorari denied 291 U. S. 673, 54 S. Ct. 458, 78 L. ed. 1062; Fisher v. Washington Coca Cola Bottling Works [App. D. C.], 84 F. 2d 261; Hagan & Cushing Co. v. Washington Water Power Co., 9 Cir., 99 F. 2d 614).

In making its contention that the opinion and decision of the Circuit Court of Appeals below violates the established rule of this Court respecting the direction of verdicts, petitioner relies principally upon the decision of the Seventh Circuit Court of Appeals in Gray v. Baltimore & O. R. Co., 7 Cir., 24 F. 2d 671, and the decisions of the Eighth Circuit Court of Appeals in Dierks Lumber & Coal Co. v. Brown, 8 Cir., 19 F. 2d 732; Southern R. Co. v. Hussey, 8 Cir., 42 F. 2d 70, and May Dept. Stores Co. v. Bell, 8 Cir., 61 F. 2d 830. None of these cases, however, support the petitioner railway's position here. In Gray v. Baltimore & O. R. Co., supra, the plaintiff was a passenger upon one of defendant's trains and injured as a result of a derailment thereof, when the train ran through an open switch, but the case was one which was taken completely out of the orbit of the doctrine of res ipsa loquitur and into the field of specific negligence, because *both the plaintiff's pleading and his evidence* established that the existence of the open switch, and the derailment, were the result of the willful and intentional acts of "vandalism" of a known third person who served a prison sentence therefor—and the fact that the case was not one for the application of the doctrine of res ipsa loquitur is fully

demonstrated by the clear and unequivocal statement of the Court there to the effect that (24 F. 2d, l. c. 673):

> "We are of the opinion that the maxim of-'res ipsa loquitur' **has no application in this case.**" (Emphasis supplied.)

Certainly, the fact that the Court there ruled that a verdict properly could be directed in that case, which indisputably was not a case within the doctrine of res ipsa loquitur, is no authority for or against the proposition here urged by petitioner railway. Certainly, too, since that was not a case within the doctrine of res ipsa loquitur, anything said therein by way of discussion in the case of Sweeney v. Erving, 228 U. S. 233, 240, 33 S. Ct. 416, 51 L. ed. 815, in connection with the weight and sufficiency of the evidence in res ipsa loquitur cases was pure obiter dictum.

The same situation which existed in Gray v. Baltimore & O. R. Co., supra, existed in the case of Dierks Lumber & Coal Co. v. Brown, 8 Cir., 19 F. 2d 732, as is clearly pointed out in the opinion of the Circuit Court of Appeals below (R. 152 and footnote, 122 F. 2d, l. c. 274 and footnote).

The decisions in Southern R. Co. v. Hussey, 8 Cir., 42 F. 2d 70, and May Dept. Stores Co. v. Bell, 8 Cir., 61 F. 2d 830, held it proper to refuse to direct a verdict for defendant in a res ipsa loquitur case, even though defendant's evidence was not directly contradicted or impeached.

Petitioner also asserts that the inference of a defendant's negligence created by the application of the doctrine of res ipsa loquitur is completely destroyed where a defendant offers uncontradicted and unimpeached evidence tending to refute such inference. This assertion not only ignores the specific language of the numerous decisions upon which we have heretofore relied, including the decisions of this

Court to the effect that the facts surrounding the occurrence afford "reasonable evidence" or "circumstantial evidence" of defendant's negligence, but also misconceives both the meaning, effect and value of "inference" and of "circumstantial evidence."

That the application of the doctrine of res ipsa loquitur does furnish substantial evidence of defendant's negligence—just as this Court specifically says it does—is quite obvious if we but consider the irrefutable maxim that a verdict must rest upon substantial evidence, together with the immutable fact that the application of the doctrine will support a verdict for a plaintiff.

The mere fact that in a res ipsa loquitur case, the defendant's negligence (i. e., the fact to be proved) rests upon inference or circumstantial evidence, rather than upon testimonial evidence, does not affect the fact that it is founded upon substantial evidence. An inference is, of course, neither evidence nor comparable to evidence, and can arise only from substantial evidence; an inference is the act of deriving or deducing a fact to be proved from evidence—that is to say, it is the means of mental persuasion by which evidentiary facts, attested either by testimonial evidence or by circumstantial evidence, establish the fact to be proved; and, if an inference may be made from certain evidence at one time, it certainly may be made from the same evidence at any other time. In Wigmore on Evidence, 3rd Ed., Vol. 1, §25, p. 398, it is clearly pointed out that, aside from Autoptic Proference, all evidence—whether it be testimonial evidence or circumstantial evidence—involves an inference from some fact to the fact to be proved, and it is there further pointed out at some length (ibid., §26, pp. 401-406; see, also, Wigmore on The Science of Judicial Proof, 3rd Ed., §§320-321, pp. 793-802), that it is impossible and futile to lay down any legalistic

rule which would attempt "to pronounce that testimonial or circumstantial evidence as a class probatively superior the one to the other." These same propositions are expounded in Greenleaf on Evidence, 16th Ed., Vol. 1, §13, p. 24, where it is further said that, irrespective of whether the fact to be proved is attested by testimonial evidence, or by circumstantial evidence, "The facts proved are, in both cases, directly attested." Thus, it has frequently been held that facts established by circumstantial evidence, or inferences of fact from circumstances, can amount to full proof, and be strong enough to overcome direct testimony to the contrary (Kempner v. Churchill, 8 Wall. [75 U. S.] 362, 369, 19 L. ed. 461; The Wenona, 19 Wall. [86 U. S.] 41, 58, 22 L. ed. 52; Bowden v. Johnson, 107 U. S. 251, 263, 2 S. Ct. 246, 27 L. ed. 386; Jacobs v. United States, 6 Cir., 31 F. 2d 568; Bausch Machine Tool Co. v. Aluminum Co., 2 Cir., 72 F. 2d 236, 240-241; United States v. Mann, 7 Cir., 108 F. 2d 354, 356). In other cases, it has been said:

> "* * * certainly **there may be evidence arising from circumstances stronger than the testimony of any single witness**" (Chief Justice Marshall, in Clark v. Riemsdyk, 9 Cranch. [13 U. S.] 153, 160, 3 L. ed. 688).
>
> "* * * if this testimony stood alone * * * no difficulty would be felt in allowing it entire judicial credence. But it is encountered by very strong circumstances on the other side; and **circumstances will sometimes outweigh the most positive testimony**" (Mr. Justice Story, in La Nereyda, 8 Wheat. [21 U. S.] 108, 170, 5 L. ed. 574).
>
> "Although such proof [i. e., direct testimonial evidence] may generally be desirable, we are not to shut our eyes on **circumstances which sometimes carry with them a conviction which the most positive testimony will fail to produce**" (Mr. Justice Livingstone, in The Robert Edwards, 6 Wheat. [19 U. S.] 187, 190, 5 L. ed. 238).

From the foregoing, it is, we submit, manifest and apparent that the inference of a defendant's negligence, arising under the doctrine of res ipsa loquitur, upon proof of the circumstances of the occurrence, is not precluded by the defendant's testimony which may tend to rebut such inference, even though the defendant's evidence may be uncontradicted and unimpeached. Accordingly, the opinion and decision of the Circuit Court of Appeals below, to that effect, in the light of the character and sufficiency of the evidence adduced by the petitioner here, is entirely correct and proper and not in conflict with any of the decisions of this Court.

III.

The Circuit Court of Appeals for the Eighth Circuit, in its opinion and decision below, ruled, in substance, that the inclusion by the trial court in his charge of a part of a special request refused as a whole, because erroneous as a whole, did not constitute such a violation of Rule 51 of the Federal Rules of Civil Procedure as to constitute reversible error (R. 157-162).

The factual situation giving rise to this ruling was as follows: The petitioner railway at the trial requested the trial court to give to the jury, among others, a special charge (No. 9, R. 132-133), which was in part to the effect that:

> "* * * the defendant may exonerate itself in one of * * * three ways * * *, namely: (1) by showing there was no defect in the appliances mentioned in evidence; or (2) that if there was defect, it arose and was created by circumstances beyond defendant's control; or (3) that such defect, if any there was, had existed for so short a period of time that defendant could not reasonably be expected to have been advised of it by the use of ordinary care on its part."

The trial judge first announced that he would not give the requested special charge as a whole, but, during the course of the arguments of counsel to the jury, he concluded that he would charge the jury respecting that portion of petitioner railway's request above quoted, and, in fact, did incorporate the substance of the above-quoted portion of the special request in his charge made to the jury at the conclusion of counsel's arguments, knowing of no other way to handle the situation after the arguments to the jury had begun (R. 123, 125). Petitioner railway's counsel objected to the incorporation of this matter into the charge (R. 125-126), stating that during the argument he had felt that he was not free to argue the substance of the hypotheses mentioned—to which the trial court replied by saying that such argument would have been proper, in any event, upon the general proposition of what was negligence (R. 126). Petitioner's counsel thereupon treated the matter as being at an end, and made no request for further argument in the light of what had occurred.

Petitioner railway does not here contend for any error in the form or substance of the trial court's charge to the jury, nor does it contend for any error in the refusal of the trial court to give as a whole the special charge requested by petitioner and refused by the Court. It contends only that the inclusion of the substance of the above-quoted portion of its special request in the charge given to the jury was error, because the trial court had previously informed petitioner's counsel that he would refuse said special request as a whole, it being petitioner's position that the trial judge thereby violated Rule 51 of the Federal Rules of Civil Procedure.

(A) Rule 51 of the Federal Rules of Civil Procedure provides:

"At the close of the evidence or at such earlier time

during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

The petitioner railway's contention that this rule was violated by what occurred in the case at bar rests, basically, upon petitioner's assumption that the sole and only purpose for the adoption of this rule was to enable counsel to know, before argument, *each and every phase* of the charge given to the jury. That position is not only wholly unsupported by any citation of authority, but it is untenable.

Prior to the adoption of Rule 51, counsel were not always informed before argument as to the contemplated action of the Court upon special requests. That meant only that there was no rule which required the trial court to inform counsel as to the form or substance of any part of the charge to be given to the jury.

By its specific terms, Rule 51 requires no more than that the trial court indicate to counsel before argument its proposed action upon such special requests to charge as might be made. That rule does not purport to require that the trial court indicate anything more than its proposed action upon a special request *as a whole*, and it does not require a trial court to indicate its action upon a special request piecemeal; it does not purport to require that the trial court shall inform counsel as to anything respecting

the charge, excepting its proposed action upon each special request *as a whole;* and it does not purport to limit the trial court, in the formulation of the charge to be given to the jury, to such matters as are contained in, or suggested by, such special requests to charge as might be made.

Manifestly, this rule deals with and affects only special requests *as a whole.* It does not deal with or affect the general charge to the jury. Notwithstanding the adoption of Rule 51, there is not now, and never has been, any rule which requires the trial court to inform counsel, prior to argument, of the *entire content* of the charge to be given the jury, nor any rule which prevents a trial judge, in formulating the charge to the jury, from gathering the material for the charge from wheresoever he pleases. The trial court, in this instance, did adopt part of the special request in making the general charge. Rule 51 did not impress the special request with a degree of sanctity that forbade the court from using in the general charge any portion of the thought contained in the special request.

How can it be said that the sole purpose of Rule 51 was to inform counsel prior to argument as to what would be contained in the charge to the jury? The primary purpose of that rule was to assist counsel in formulating and making their objections to the giving and refusal of the whole of each special request to charge. In the absence of any rule requiring the trial court to inform counsel before argument of the entire content of the charge to the jury, it cannot be said that, where the trial court has indicated its proposed action to refuse, and does refuse, a special request as a whole, because erroneous as a whole,* the Court has violated a rule which requires no more than it should indicate before argument its proposed action upon such special request. Has not the trial court

* Petitioner's refused special request was, as we shall presently show, erroneous as a whole, and petitioner has never contended otherwise.

done, under these circumstances, exactly what the rule provides it should do?

The correctness of our position in this matter is fully demonstrated by the incongruous results which must necessarily follow the sustaining of petitioner's position here. The sustaining of petitioner's position here would require that, in every instance, counsel must be informed before argument as to the *entire content* of the charge to be given the jury, and this would, in many instances, either compel the trial court to commit error manifest to it at the time, or compel the trial court to disrupt the trial. For example, if a trial judge once indicated before argument his proposed action upon the special requests to charge, he could not, after argument began, adopt in the general charge to the jury any correct and pertinent portion of the special request which he had indicated would be refused as a whole, because erroneous as a whole; nor could he delete from his charge to the jury any erroneous and improper portion of a special request which he had previously indicated that he could give as a whole. That is to say, he could never alter or modify his proposed action upon a special request as a whole, no matter how erroneous such proposed action would be if performed, and he would be compelled to commit error by the carrying out of his proposed action, even though he had become fully cognizant that his proposed action would constitute error. The only alternative would be for the trial judge, upon discovering that his general charge should contain a portion of the subject matter of a special request which had properly been refused as a whole, or that his general charge should omit a portion of the subject matter of a special request which he had indicated would be given as a whole, to completely disrupt the trial (whether by then stopping the arguments being made, or by waiting until the arguments then being made were concluded), in order

to hold a conference with counsel to rediscuss both the special requests to charge and the entire content of the charge to be given, and, then, order or permit counsel to reargue the case to the jury—a procedure which would, manifestly, throw more confusion than light into the minds of the jurors respecting the case to be determined by them.

Of a certainty, it was not the intention that the adoption of rule 51 should serve the purpose of hamstringing the courts so as to compel the commission of error, or compel the disruption of trials, which would inevitably result from such a strained construction of that rule as would require the courts to inform counsel before argument of the entire content of the charge to be given to the jury. The rule makes no such requirement, and, absent such requirement, petitioner railway's entire contention here is without foundation. Accordingly, we most respectfully submit that there was no violation of rule 51 by the occurrence at the trial in the case at bar.

(B) In any event, even if there was a violation of rule 51 by what occurred in the case at bar, such error as might inhere therein did not justify a reversal of the judgment in the trial court. Numerous decisions of this Honorable Court and of the lower federal courts, as well as the federal statutes (Sec. 269 of the Judicial Code, as amended, 28 U. S. C. A. § 391) and the Federal Rules of Civil Procedure (Rule 61), admonish that error must be disregarded unless it is "inconsistent with substantial justice" and affects the "substantial rights" of the complaining party. How was petitioner railway prejudiced by the violation of rule 51, if there were any such violation? It contends that it was prejudiced only in that it was "prevented" from arguing the hypotheses contained in that part of its refused special charge, the substance of which was included in the general charge to the jury.

The here-involved portion of petitioner's refused special charge, the substance of which was incorporated in the charge given the jury, was taken bodily from the opinion in Dierks Lumber & Coal Co. v. Brown, 8 Cir., 19 F. 2d 732, 736, and, while it may have been an eminently proper charge in the Dierks case (because the plaintiff in the Dierks case offered proof of a specific defect as the alleged cause of her injury), it does not follow that the same reasoning and principles of law applicable in the Dierks case should be applicable to all negligence cases, regardless of the pleading or proof, and, certainly, such reasoning and principles were not intended to apply to a res ipsa loquitur case where plaintiff's evidence established general negligence on the part of the defendant. The "error embodied in the charge to the jury" in the case at bar (i. e., the error in the substance of the charge) was one highly favorable to petitioner railway, for that portion of the charge here involved greatly and improperly lessened the burden which the law placed upon petitioner railway with reference to explanation of the occurrence which would suffice to exculpate petitioner railway from negligence (e. g., it ignored entirely petitioner railway's duty to adopt reasonably safe means to avert the consequences of known inefficiencies and insufficiencies in its interlocking switch system, and it erroneously required plaintiff to prove a specific defect in petitioner railway's appliances).

If, as we believe, this portion of the charge to the jury was erroneous in substance, then petitioner railway had no right to argue to the jury the hypotheses contained therein, and the petitioner railway could not have been prejudiced, or its substantial rights adversely affected, by any action of the trial court which may have "prevented" petitioner from arguing those hypotheses. If this portion of the charge was erroneous, as we believe it was, the sustaining of petitioner's contention here would be

to permit petitioner to take advantage of, and secure a reversal upon, an error favorable to it, and brought about by its conduct.

Furthermore, the fact of the matter is that petitioner's counsel was not prevented from arguing any matter which was consistent with the defense of "no negligence." The trial court very aptly so stated when it told petitioner's counsel (R. 126) that the circumstances of the inclusion of that portion of the charge did not "prevent" an argument to the jury of the hypotheses therein contained, and that such hypotheses properly could have been argued "under the general proposition of what was negligence," irrespective of whether the charge to the jury did or did not contain that portion thereof here under consideration, and petitioner's counsel did not make any request that he be permitted to make further argument in the light of what had occurred.

By way of summary of the point now under consideration, let us point out that the course pursued by the trial court in the case at bar, with respect to the matter now under consideration, was the only logical, practical course to be pursued under the circumstances in order to prevent a disruption of the trial; that the course pursued did not constitute a violation of Rule 51 of the Federal Rules of Civil Procedure; and that by no stretch of the imagination could it be said that it was prejudicial to petitioner railway, so as to affect the substantial rights of the petitioner, when petitioner's counsel failed to request an opportunity to make further argument to the jury. Accordingly, the matter here so strenuously complained of by petitioner, even if erroneous, was, as the Circuit Court of Appeals below ruled, directly within Rule 61 of the Federal Rules of Civil Procedure, which, in so far as is here applicable, provides:

"No error * * * in anything done or omitted by the Court * * * is ground * * * for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless * * * [it] appears to the court inconsistent with substantial justice. **The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.**" (Bracketed portion and emphasis supplied.)

CONCLUSION.

In conclusion, we most respectfully submit that, for the reasons and upon the authorities hereinbefore referred to, the opinion and decision of the Circuit Court of Appeals for the Eighth Circuit in the case at bar was entirely correct and proper, and not in conflict with any decision of this Court, or any decision of any of the other of the various circuit courts of appeals. Accordingly, we most respectfully submit that the issuance of a writ of certiorari in this case could serve no useful purpose, and that petitioner's petition for writ of certiorari should be denied.

Respectfully submitted,

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